No. 99-768

In The

Supreme Court of the United States

N.A.S. HOLDINGS, INC.,

Petitioner,

v.

CONNIE PAFUNDI,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Vermont

BRIEF IN OPPOSITION

ALLAN R. KEYES, ESQ.
Counsel of Record
RYAN SMITH & CARBINE, LTD.
Attorneys for Respondent
P.O. Box 310
Rutland, Vermont 05702-0310
(802) 786-1035

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent does not agree that the questions presented by Petitioner are properly before the Court based on the proceedings below. Rephrased, the questions presented are:

1. The Petitioner seeks correction of claimed error by the State court in the application of State law. No federal question was raised at any stage of the proceedings below. Does the Court have jurisdiction to review the decision of the Vermont Supreme Court?

2. Does this case present an important question of whether the due process clause of the Fourteenth Amendment prohibits the shifting of the burden of proof on the state law elements of adverse possession?

3. Does this case present an important question of whether the due process clause of the Fourteenth Amendment prohibits a departure from established precedent in a State's common law of adverse possession?

4. Does this case present an important question of whether the evidence supports the findings and conclusion of adverse possession?

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JURISDICTION

Petitioner claims this Court has jurisdiction to review what Petitioner asserts is a "patently erroneous and unsubstantiated decision" of the Supreme Court of Vermont. The Vermont Supreme Court's decision relies exclusively on State law. This Court does not sit to correct error in the State court's application of State adverse possession law to the "unusual and complicated facts" of this case. Because the Petition raises no substantial federal question and because Petitioner did not preserve below any of the federal questions raised here, the Court has no jurisdiction to grant the writ. 28 U.S.C. § 1257(a); Sup.Ct.R. 14.1(g)(i).

The Court should also deny the Petition in the exercise of discretion. The claimed federal issues are not controlling, and the record does not clearly present these issues. The request for error-correction is of no jurisprudential importance to anyone other than the parties. The case thus presents no "compelling reason" to grant the writ. Sup.Ct.R. 10.

STATUTES INVOLVED

28 U.S.C. § 1257(a) provides in part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States.

STATEMENT OF THE CASE

The dispute arises out of competing claims to ownership of a slate quarry in West Pawlet, Vermont. The Vermont Supreme Court said the facts are "unusual and complicated" but the legal issues are "simple." (Opinion of the Vermont Supreme Court; Petition Appendix A at 1a.)

The trial court found that Respondent Connie Pafundi established, through adverse possession, title to the floor of the quarry but not to its walls. Respondent appealed to the Supreme Court of Vermont claiming title to the entire quarry as a single physical unit. The Vermont Supreme Court affirmed the finding of adverse possession, and extended it to the entire quarry under the law of constructive possession.

The Petition is based on such assertions as, "The decision of the Vermont Supreme Court lacks any evidentiary basis and is a completely unreasoned abandonment of two hundred years of Supreme Court precedence [sic] on the issue of adverse possession. . . . " Respondent believes that Petitioner has misstated the facts and the applicable law, and that the questions presented by Petitioner are not properly before the Court based on the proceedings below. In particular: 1) the Vermont Supreme Court did not shift the burden of proof; 2) the Vermont Supreme Court did not depart from precedent; 3) the evidence supports the findings and conclusion that Respondent established open, notorious, hostile and continuous possession throughout the statutory period of fifteen years beginning in 1972. The facts and proceedings are summarized below.

The quarry has clear physical man-made boundaries consisting of slate dumps on either side of the quarry pit. The trial court described the quarry:

> The east butt is a nearly vertical wall over 100 feet high. There are slate dumps from many years ago along the ridge to the east. The west slant is a sharp, perhaps 45 degree or more in places, slope to the west. It too is topped with slate dumps from years past.

(Findings of Fact and Opinion, August 1, 1997; Petition Appendix C at 39a.) To the north lies the so-called "Jones Quarry," purchased by Respondent's father-in-law, Ted Pafundi, from their neighbor, Marguerite Scott, in 1971.

In 1972, Ted Pafundi acquired additional property from Marguerite Scott, what was then referred to as the "Scott Quarry" and later as the "Pafundi Quarry," which is the parcel contested in this case. The deed described the eastern boundary of the acquired property as "the westerly boundary of the lands of Rising & Nelson". No one at Rising & Nelson knew the location of their western boundary and no one from Rising & Nelson had ever enforced a boundary at the quarry. Petitioner acquired the property of Rising & Nelson in 1992, and the survey conducted at that time revealed that virtually the entire quarry was within Rising & Nelson lands. The current conflict arose when Petitioner attempted to begin operations in the quarry in 1992.

Ted Pafundi had begun quarrying operations in this quarry in 1972, primarily extracting slate from the slant wall on the west side of the quarry. Ted Pafundi worked the west wall of the quarry more or less continuously from 1972 until his death in 1979. His son, Gary Pafundi,

worked the east wall of the quarry more or less continuously from 1979 until his death in 1989. The evidence and findings establish that the Pafundis exclusively occupied, possessed and operated the quarry from 1972 through 1992, when this action arose. No one other than Ted or Gary Pafundi worked the quarry from 1972 until 1989. (Findings of Fact and Opinion, August 1, 1997 at 15-16; Petition Appendix C at 37a-38a.) Whenever there were operations in the quarry, it was open for all to see. (Findings of Fact and Opinion, August 1, 1997; Petition Appendix C at 31a.) Many witnesses testified to personal observation of the Pafundis' operation, which the trial court found to be "open," "notorious" and "hostile". (Findings of Fact and Opinion, August 1, 1997; Petition Appendix C at 31a-32a.) The trial court determined that neither of the walls of the quarry had been used continuously for the fifteen-year statutory time period. However, because the floor of the quarry was the base of operations for both Ted and Gary Pafundi between 1972 and 1989, they had successfully established adverse possession of the quarry floor.

On appeal no party briefed any question of federal law or constitution. The parties proceeded on the assumption that the common law of Vermont provides the rules of decision. No party ever asserted that the due process clause of the Fourteenth Amendment establishes any substantive or procedural rules by which adverse possession is determined. The Vermont Supreme Court first affirmed the finding of adverse possession because "The findings of the trial court were supported by credible evidence, and there was no misapplication of law." (Opinion of the Vermont Supreme Court; Petition Appendix A at 8a.)

Specifically the Court rejected arguments that the Pafundis did not use the quarry floor continuously as an average quarry operator would have used the land. "The testimony at trial of individuals involved in the quarry business provided a sufficient evidentiary basis for the court to draw conclusions as to average use." (Opinion of the Vermont Supreme Court; Petition Appendix A at 9a.) Moreover the credible evidence supported the finding that the use of the quarry floor was continuous; the periods of time when operations slowed or stopped are consistent with the exigencies of a family-run business. (Opinion of the Vermont Supreme Court; Petition Appendix A at 10a.) In this case, the Court commented, "it is hard to imagine how the Pafundis would have acted any differently toward the land had they held record title." (Opinion of the Vermont Supreme Court; Petition Appendix A at 9a-10a.) In short, there was "sufficient credible evidence to uphold the trial court's ruling as to the quarry floor." (Opinion of the Vermont Supreme Court; Petition Appendix A at 11a.)

The Vermont Supreme Court next held that Respondent established constructive possession of the entire quarry for the statutory time period of fifteen years. Under the doctrine of constructive possession – a well-settled aspect of the law of adverse possession in Vermont – actual possession of a part results in constructive possession of the whole, if there are clear boundaries on the claimed property. The Court rejected Respondent's position that constructive possession can occur only where there is "color of title" pursuant to a deed that clearly describes the property in terms of metes and bounds measurements. It characterized this position as

"in direct conflict with our case law." (Opinion of the Vermont Supreme Court; Petition Appendix A at 13a n.5.) Thus the relevant inquiry concerns the objective physical characteristics of the property. The trial court's findings of fact show that the property was a clearly bounded, distinct and recognizable parcel. Therefore, the Court held that Respondent established adverse possession of the entire quarry. (Opinion of the Vermont Supreme Court; Petition Appendix A at 12a.)

Petitioner moved for reargument, but did not raise any of the claims made here that the decision violates the due process clause of the Fourteenth Amendment. The Court denied the motion. (Petition; Appendix D.)

ARGUMENT

I. The Court does not have jurisdiction to review the questions presented.

Petitioner claims that the Vermont Supreme Court misapplied the State law of adverse possession, and that its errors amount to a federal due process violation. But an objection to a State court's application of State law does not raise a federal question appropriate for review by this Court. *Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6 (1980). This Court has no general supervisory authority over State courts or State law. *Compare* 28 U.S.C. § 1254(1) *with* 28 U.S.C. § 1257(a). As Mr. Justice Holmes said of a claim that a State court has a constitutional obligation to follow its own precedents:

> Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. . . . [I]n general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong, or because earlier decisions are reversed.

Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 461 (1907).

Likewise, the Court has no roving authority to review the sufficiency of the evidence to support the findings of fact of a State court. The early cases cited by Petitioner (Petition at 3) espousing the notion of independent appellate review of "constitutional facts," require independent examination of a factual record only where some federal right is denied. No federal right is involved here.

Further, there is no jurisdiction because Petitioner never specifically raised below its claims of federal due process violation. As applied to the circumstances of this case, the relevant jurisdictional statute requires that petitioner in the State courts have "specially set up or claimed under the Constitution . . . of . . . the United States" that right which it now seeks to have this Court enforce. 28 U.S.C. § 1257. Similarly, this Court's Rules require

> specification of the stage in the proceedings, both in the court of first instance and in the

> appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Sup.Ct.R. 14.1(g)(i).

Nowhere in the Petition is there an attempt to comply with this Rule. Nowhere in the opinion of the Vermont Supreme Court does the Court pass upon or even mention any federal question. Nowhere in the motion for reargument does Petitioner raise any federal issue.

When the highest State court has failed to pass upon a federal question, this Court will assume that the omission was due to want of proper presentation in the State courts. *E.g., Adams v. Robertson*, 520 U.S. ___, 137 L. Ed. 2d 203 (1997); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). The aggrieved party bears the burden of defeating this assumption by demonstrating that the State court had "a fair opportunity to address the federal question that is sought to be presented here." *Webb v. Webb*, 451 U.S. 493, 501 (1981).

The claim of unexpected departure from precedent by the Vermont Supreme Court does not excuse the failure to give that court, on motion for reargument, "a fair opportunity to address the federal question that is sought to be presented here." Petitioner's reliance on *Saunders v. Shaw*, 244 U.S. 317 (1917) is misplaced. *Saunders* shows it is sometimes possible to present a federal claim even

though not raised in lower state courts, but this occurs only when the aggrieved party has no opportunity to raise the federal issue in the highest State court earlier than a motion for rehearing. *See id.* 244 U.S. at 320; *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (State supreme court overruled prior precedent and appellant explicitly presented their federal constitutional right before that court); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1929) (If a federal question arises because of an unexpected construction of a State statute by the highest State court, the question is timely raised for purposes of review by this Court if it is presented in the petition for rehearing.) Here there was no departure from precedent, but the failure to preserve the federal questions on motion for reargument precludes review.

II. The case does not present a question of whether the due process clause of the Fourteenth Amendment prohibits the shifting of the burden of proof on the state law elements of adverse possession.

The Petition asserts that the Vermont Supreme Court shifted the burden of proof from the adverse claimant to the record titleholder. This is not so. The Vermont Supreme Court expressly stated that to "achieve title through adverse possession, a claimant must demonstrate that possession of the land was open, notorious, hostile and continuous throughout the statutory period of fifteen years." (Opinion of the Vermont Supreme Court; Petition Appendix A at 4a.)

Petitioner bases its assertion here on a passing comment in the opinion of the Vermont Supreme Court that Petitioner "cites no law requiring claimants to present evidence specifically directed to the issue of average use." (Opinion of the Vermont Supreme Court; Petition Appendix A at 9a.) Nothing in this comment about the failure of Petitioner to support its contentions with legal authority is a ruling that Petitioner had the burden of proof.

"Average use" is not one of the elements of adverse possession, but is a standard developed in the case law to be used by the trial court in assessing a claimant's possessory acts." (Opinion of the Vermont Supreme Court; Petition Appendix A at 9a.) The Court did not rule that a lack of evidence required a ruling for Respondent. The Court ruled that "The testimony at trial of individuals involved in the quarry business provided a sufficient evidentiary basis for the court to draw conclusions as to average use." (Opinion of the Vermont Supreme Court; Petition Appendix A at 9a.)

Similarly, the Court affirmatively found, without reference to burden of proof, that the evidence fully supported the findings that Respondent's use of the quarry floor was open, notorious, hostile and continuous. Summarizing all the evidence, the Court said "In this case, it is hard to imagine how the Pafundis would have acted any differently toward the land had they held record title to it." (Opinion of the Vermont Supreme Court; Petition Appendix A at 9a-10a.) Because the Court held that the evidence was sufficient to support the trial court's findings of adverse possession, the decision does not present

any issue of shifting the burden of proof, much less a federal due process issue.

III. The case does not present a question of whether the due process clause of the Fourteenth Amendment prohibits a departure from established precedent in a State's common law of adverse possession.

The Petition asserts the Vermont Supreme Court "abruptly departed from long-standing and well-established concepts of property law which form the basis for title certification, conveyance and compromise the marketability of real property which is the cornerstone of American society." (Petition at 2.) This is not so. The Vermont Supreme Court applied a well-established rule of constructive possession.

In Vermont a claimant may achieve possession of an entire plot of land through actual occupation of a part. This rule applies not only when the possessor has "color of title," but also when the land has clear and definite boundaries. An 1865 decision explains "In this state a more liberal doctrine has long been maintained," that a person without color of title to a lot with definite boundary marks may have constructive possession of the whole lot, and can acquire a title to the whole by partial occupation for fifteen years. *Hodges v. Eddy*, 38 Vt. 327, 338, 346 (1865).

This rule is perhaps based on Vermonters' long memory of New York's attempted usurpation of their possessory rights under the New Hampshire grants.

Whatever the history, the rule is well settled that a claimant may establish ownership through constructive possession of clearly bounded land. *See also Community Feed Store, Inc. v. Northeastern Culvert Corp.*, 151 Vt. 152, 156, 559 A.2d 1068, 1070 (1989); *Thurston v. Batchellor*, 100 Vt. 334, 341, 137 A. 199, 202 (1927); *Lang v. Clark*, 85 Vt. 222, 233, 81 A. 625, 630 (1911); *Rice v. Chase*, 74 Vt. 362, 366, 52 A. 967, 968 (1902); *Bragg v. Laraway*, 65 Vt. 673, 27 A. 492 (1893).

Here, the Vermont Supreme Court applied this rule to the facts found by the trial court. No new law is involved in this decision, much less a due process violation.

IV. The case does not present a question of whether the evidence supports the findings and conclusion of adverse possession.

This Court does not have general authority to review the findings of fact of the State court to determine whether they have evidentiary support. Nevertheless, the Petition repeatedly complains that there is no evidence to substantiate the ruling of the Vermont Supreme Court that Respondent established adverse possession. (E.g., Petition at 2.) The only specific is a claim that there was no evidence that "the slate dumps which preexisted the Respondent's use and which were of unknown origin, were boundaries." (Petition at 7.) This is not so.

The testimony shows the slate dumps to east and west of the quarry are "a permanent boundary" and a

"very visible" limit of the Pafundis' possession. (Testimony of Timothy Hecei, 12/12/96 Tr. 319-20.) As one witness testified:

> [I]f you could be there and could see it, the natural lay of the land will let you know where the natural boundaries are. . . . If you could be there and could see a solid wall of stone that runs for hundreds of feet and many, many feet high, and then a quarry got piled on top, you would understand the boundary line. That's the way it's been for a hundred years.

(Testimony of John McGuire, 12/13/96 Tr. 261.) The quarry is one large hole in the ground with definable limits. (Testimony of R. Clark Hicks, 12/13/96 Tr. 101.) When the Pafundis occupied this quarry, they constructively occupied it to the limits of its clear physical boundaries.

The opinion of the Vermont Supreme Court is supported not only by this testimony, but also by the unchallenged findings of the trial court, that "indicate that the boundaries on the surface of the land were definite . . . that 'the configuration of the quarry is quite clear' and recognized the slate dumps as obvious features on both the eastern and western sides of the quarry." (Opinion of the Vermont Supreme Court; Petition Appendix A at 11a-12a.)

The case does not present any issue of the sufficiency of the evidence, much less a federal due process issue.

CONCLUSION

The case presents no "compelling reason" to grant the writ of certiorari. The Court has no jurisdiction to review the decision of the Vermont Supreme Court for the sufficiency of the evidence or for errors in State law. Petitioner did not preserve the claimed federal issues at any stage in the proceeding below. The federal issues are insubstantial and did not control the result. The request for error-correction is of no jurisprudential importance to anyone other than the parties. The Court should deny the Petition.

Respectfully submitted,

ALLAN R. KEYES, ESQ.
Counsel of Record
RYAN SMITH & CARBINE, LTD.
P.O. Box 310
Rutland, Vermont 05702-0310
(802) 786-1035

Attorneys for Respondent